KOAY CHENG ENG

v.

LINDA HERAWATI SANTOSO

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[DIVORCE PETITION NO: S4-33-1274-1999]
28 MAY 2004

FAMILY LAW: *Divorce - Irretrievable breakdown of marriage - Reasons for breakdown - Culpability - Whether due to unreasonable behaviour of wife - Whether due to infidelity of husband - Order for maintenance - Division of matrimonial property*

FAMILY LAW: *Financial obligation - Maintenance payments - Whether just to order maintenance and arrears of maintenance for wife - Seventeen years of marriage - Wife having sacrificed professional career - Whether husband gave full and frank disclosure of income - Adverse inference - Fair sum to award - Law Reform (Marriage and Divorce), s. 86 - Evidence Act 1950, s. 114(g)*

FAMILY LAW: *Matrimonial property - Division of property - Principles - Contribution of parties - Real property - Motor vehicles - Business (medical clinic) - Provident fund contributions, whether matrimonial assets - Whether wife entitled to half of husband's provident fund contribution as at date of divorce - Law Reform (Marriage and Divorce) Act 1976, ss. 76*

In his petition for the dissolution of his marriage to his wife ('the respondent'), the petitioner prayed that no financial provisions be made for her. However, in her cross-petition for the dissolution of the same, the respondent prayed for an equal division of all matrimonial assets as well as maintenance payments of RM10,000 per month including the arrears. The petitioner and the respondent were married in the UK in 1986 and both parties had worked in the UK and had purchased properties there. In 1993, the marriage was registered in Malaysia in compliance with s. 31 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). Subsequently, when the parties moved to Malaysia, they purchased some properties here. The moneys repatriated from the UK were used to finance some of these acquisitions. The petitioner (an ENT surgeon) had then set up his private practice in Malaysia. The respondent (an architect), however, was unable to practice here as she could not register

with the governing body, being neither a citizen nor a permanent resident of Malaysia. In 1998, the petitioner moved out of the matrimonial home whilst the respondent continued to live there. There were no children of the marriage and the petitioner had not paid any maintenance to the respondent.

Although the parties admitted that their marriage had broken down irretrievably, the culpability for the breakdown was disputed. The petitioner claimed that the breakdown started soon after the marriage (whilst they were still in the UK) and was due to the respondent's immature, irresponsible, stubborn and vindictive temperament and behaviour. Conversely, the respondent claimed that infidelity on the part of the petitioner was the cause of the breakdown in their marriage.

In respect of the financial obligations of the parties, the petitioner contended that the respondent is not entitled to any maintenance payments as she is a professionally qualified architect, licensed to practice in the UK and, hence, capable of earning a living in the UK, free from the responsibility of raising any children. The petitioner declared his monthly income at RM10,000. The respondent disputed this and submitted that the petitioner had failed to make a full and frank disclosure of his income. The petitioner also contended that the respondent is ineligible to a share of the matrimonial assets because she did not contribute towards the purchases of the properties. The respondent, on the other hand, submitted that she is entitled, under of s. 76(1) and (2) of the Act, to half of all the matrimonial assets, including the properties and motor vehicles owned by the petitioner, a share in the petitioner's ENT clinic, and an equal share in the petitioner's provident fund contributed during the subsistence of the marriage.

Held (dismissing petitioner's petition and allowing respondent's cross-petition):

[1] The petitioner's assertion that the marriage had started to break down whilst they were still in the UK could not stand. The respondent's version as to the breakdown of the marriage was more credible. On the totality of the evidence adduced, it was more probable that it was the husband who was responsible for the breakdown of the marriage. Accordingly, the petitioner's petition was dismissed, and the marriage was dissolved pursuant to the respondent's cross-petition. (pp 253 e & 254 e)

[2] The petitioner's contention that the respondent should not be paid any maintenance was unsustainable. The parties had been married for 17 years and the respondent had hoped for the marriage to survive. The respondent had sacrificed a career as an architect to follow the petitioner in his various postings before they moved to Malaysia 11 years ago. It would be a grave injustice to not order maintenance in favour of the respondent. (p 257 a-c)

[2a] On the evidence, the petitioner had not given a full and frank disclosure respecting his income; hence, an adverse inference must be drawn against him in respect thereof. Nevertheless, the respondent is not entitled to maintenance payments in the amount prayed for (RM10,000 per month). The sum of RM6,000 per month would be more appropriate. (pp 259 g-h & 260 a)

[2b] Section 86 of the Act provides for the recovery of arrears of maintenance. Since the petitioner had not paid the respondent any maintenance since July 1998 when he left the matrimonial home, an order for arrears of maintenance from July 1998 at the rate of RM6,000 per month would be apposite. (p 260 c)

[3] The properties acquired by the parties in Malaysia were paid for mostly with the moneys repatriated from the UK. Some of such properties were subsequently disposed of and the proceeds were used to purchase other properties. Indeed, the respondent was able to show a direct contribution in relation to the purchase of the properties in the UK. Consequently, she would be entitled to an equal share in the properties purchased in Malaysia. (pp 260 d & 266 f)

[3a] On the evidence, the respondent was never involved in the setting up or management of the petitioner's clinic; thus, she was unable to prove her claim of having contributed to the clinic. (pp 267 f-h)

[3b] The motorcar which was acquired in the UK and brought to Malaysia was purchased with the parties' joint funds. The new motorcar that was purchased in Malaysia with the proceeds from the sale of the UK motorcar had been intended for the respondent's use. When this motorcar was leased to the petitioner's holding company, the petitioner received the sum of RM120,000. Consequently, the respondent is entitled to an equal share in the value of the motor vehicles registered in the petitioner's name. (pp 268 b-f)

[4] Provident fund contributions are matrimonial assets if acquired during the marriage. The respondent entered into the marriage with the intention of spending the rest of her life with the petitioner, and that on his retirement, they might both benefit from the contributions. The petitioner should not be the sole beneficiary because of the breakdown of the marriage. The respondent is entitled to half the amount standing in the fund at the time of the divorce, and such moneys should be paid out to the respondent when the same becomes payable to the petitioner. (pp 268 h & 269 e-f)

Case(s) referred to:
Re Borthwick (Deceased), Borthwick v. Beauvais [1949] Ch 395 ***(refd)***
Ching Seng Woah v. Lim Shook Lin & Anor [1997] 1 CLJ 375 CA ***(refd)***
Leow Kooi Wah v. Philip Ng Kok Seng [1997] 3 MLJ 133 ***(refd)***
Shirley Koo v. Kenneth Mok Kong Chua [1989] 2 MLJ 264 ***(refd)***
Sivanes Rajaratnam v. Usha Rani Subramaniam [2002] 3 CLJ 300 CA ***(refd)***
V Sandrasagaran Veerapan Raman v. Acttarssar Velentine Souvine Marie [1999] Mallal's Digest 557 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Law Reform (Marriage and Divorce) Act 1976, ss. 31, 54, 76(1), (2), 77(1), 78, 86

For the petitioner - Manjeet Singh; M/s Harun Idris, Yeoh & Partners
For the respondent - YN Foo (Faridah Abdullah); M/s YN Foo & Partners

JUDGMENT

Raus Sharif J:

Petition And Cross Petition

In a petition for divorce dated 1 September 1999, the petitioner husband (husband) prays that the marriage between him and the respondent wife (wife) be dissolved. He also prays that no financial provision be made for the wife but is willing to bear the costs of this petition.

In answer to the said petition and in a cross petition dated 31 May 2000 the wife also prays that the marriage be dissolved. However, the wife prays that there must be division of all matrimonial assets equally between them, maintenance of RM10,000 a month, or such other reasonable sum, and that the costs of the proceedings.

Facts

From the pleadings and evidence adduced by both parties in court, the facts of this case are as follows:

The husband is a Malaysian. The wife is an Indonesian of Chinese decent. The parties were married in the United Kingdom on 27 September 1986. It was the wife's first marriage and the husband's third marriage. There are no children of the marriage.

The parties met in London in 1984. At that time, the husband was working towards his Fellow of Royal College of Surgeon (FRCS). The wife was studying architecture in Germany.

In 1991 the husband passed his Part 2 FRCS examinations qualifying him to practice as an Ear and Throat Surgeon (ENT). In the same year, the wife, after completing her studies in Germany, qualified to practice as an architect in United Kingdom.

Both parties worked whilst in United Kingdom, and accumulated funds to acquire and live in and/or maintain the following properties:

(i) 111, Queen Court, Queensway, London.

(ii) 53, Ringmore Rise, Forest Hill, London; and

(iii) 40, Derby Hill, Forest Hill, London.

In 1993 both parties returned to Malaysia. A Mercedes Benz 190E was imported into Malaysia from the United Kingdom and given Malaysia No BDV 411. On 22 September 1993 their marriage was registered in Malaysia in compliance with s. 31 of the Law Reforms (Marriage and Divorce) Act 1976 (Law Reforms Act). In Malaysia the parties lived at No 25-A, Bangsar Heights Condominium, Lorong Kalai, Bangsar and subsequently at No 5-11-7, Pantai Panorama Condominium, Off Jalan Kerinchi.

During the marriage the following Malaysian properties were purchased:

(i) An apartment at A-15-05, Sunnyville, Penang.

(ii) Two lots of land at Taman Lumba Kuda, measuring in total 8,605 sq ft held under title HS (M) 276/1991 PT 1252 and HS(M) 277/1991 PT 1263 both at Mukim Alor Merah, Kedah Darul Aman.

(iii) An apartment at 22-03A, Midland Park, Penang.

(iv) Two shoplots at Sunny Point, Penang.

(v) Semi-detached house at Taman Golf, Alor Setar.

(vi) Clinic premises at Gleneagles Intan Medical Centre, Kuala Lumpur.

(vii) Land at Country Heights, Mines Resort.

Monies repatriated from United Kingdom were used to purchase or pay for the deposit for some of the abovementioned properties in Malaysia. But the properties at Bangsar Heights Condominium and Midland Park, Penang, were sold with the proceeds retained solely by the husband.

The husband completed his three years government service at University Hospital, Petaling Jaya, whereupon he commenced private practice in 1996. However, the wife cannot work as an architect in Malaysia. This is because she is not a permanent resident and thus unable to sit for the Pertubuhan Akitek Malaysia (PAM) examinations, for the purpose of practising architecture in Malaysia. In Malaysia, the wife, while being married to the husband was on a yearly visa under sponsorship of the husband, with a view to permanent residence after five years.

The husband commenced his private practice as an ENT specialist at Tung Shin Hospital, later moved to Gleneagles Intan Medical Centre and currently runs his practice there.

Two companies were set up during the marriage:

(i) Swiss Atlantic Sdn Bhd – A company set up as vehicle to receive the fees charged by the husband in his private practice. The husband is the majority shareholder holding 90% and his mother and sister hold 5% each.

(ii) Eng Hoe Leong Sdn Bhd – A company set up as a property holding company. The husband and his two brothers hold 30% each and the wife holds 10%.

The husband moved out of the property at Pantai Panorama Condominium sometime 1998. The wife continues to live there. The husband has paid no maintenance to the wife from the time he left the matrimonial home until now.

Issues And Findings

1. Breakdown Of Marriage

Both parties have admitted to the fact that the marriage has irretrievably broken down. However, responsibility for the breakdown is disputed and each party alleged that the other is responsible.

Section 54 of the Law Reform Act provides as follows:

> 54 Proof of Breakdown
>
> In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:
>
> (a) ...
>
> (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (c) ...
>
> (d) ...

The husband contends that the marriage broke down shortly after the marriage in United Kingdom in 1986. According to the husband, he found the wife to be, *inter alia*, stubborn, vengeful, immature and irresponsible. According to him they were constantly quarrelling and did not get along in any manner. In the words of the husband, "It was a nightmare, as we were constantly quarrelling and I had to put up a false front to friends and relatives as though things were fine between us".

On the evidence adduced before me, I find it difficult to accept the husband's contention that the marriage broke down shortly after their marriage in United Kingdom. The husband's claim is clearly contradicted by the following facts:

(i) The photographs tendered by the wife which were taken from the beginning of the marriage through to the time they returned to Malaysia showed them as a couple, very happy in the company of each other with the husband often shown with his arms around the wife. Given the intimate and warm body language depicted in those photographs, I find it difficult to believe the claim by the husband that the poses were in any way manipulated or pretences on his part.

(ii) They went as a couple on a world tour just before their return to Malaysia.

(iii) Seven years after their marriage in United Kingdom, they registered their marriage in Malaysia in accordance with the Law Reform Act.

(iv) Properties were acquired in United Kingdom and in Malaysia in joint names after their marriage.

(v) A housewarming barbeque was hosted by the couple at their residence as recently as March 1998, that is, after twelve years of marriage. A witness, Chye Saw Meng (RW2) who attended the dinner, testified that the couple was interacting as any normal husband and wife.

On the above facts, the claim by the husband that the marriage had broken down from the early days in United Kingdom cannot stand. To me, the wife's version as to why the marriage broke down is more credible. According to the wife, the marriage broke down because the husband had other women in his life. To support her claim, she had tendered an e-mail from one Michelle Toh to the husband in which the said Michelle Toh had thanked him for some perfume. Further, RW2 also gave evidence that at a Masonic dinner to which she and her husband were invited by the husband, the husband had brought another woman, despite the fact that the Masonic dinners were to honour one's wife.

Thus, taking the totality of the evidence before me, it is my finding that the husband was responsible to the breakdown of the marriage. Accordingly, prayer (1) of the husband's petition is dismissed and the marriage is dissolved on prayer (2) of the wife's cross petition.

2. Maintenance

The power to award maintenance to a wife is clearly provided by s. 77(1) of the Law Reforms Act which reads as follows:

77 Power for court to order maintenance of spouse.

(1) The court may order a man to pay maintenance to his wife or former wife:

(a) during the course of any matrimonial proceedings;

(b) when granting or subsequent to the grant of a decree of divorce or judicial separation;

(c) if, after a decree declaring her presumed to be dead, she is found to be alive.

Further s. 78 of the Law Reforms Act provides that in assessing the amount of maintenance to be paid by a man to his wife or former wife, "the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage".

What is maintenance is defined in *Re Borthwick (Deceased), Borthwick v. Beauvais* [1949] Ch 395 where at p. 401, His Lordship Harman J held:

> It is said that maintenance is the only thing that you can look at. What does that mean? It does not mean that you can only give the dependant just enough to put a little jam on his bread and butter. It has been already held that what is reasonable for one may not be reasonable for another. It must depend on the circumstances of the case. It certainly depends to some extent on the circumstances of the widow, but I think it may also depend on the circumstances of the testator, that is to say, whether he dies a rich man or no, because a rich man may supposed to have made better provision for his wife's maintenance than a poor one. Maintenance does not only mean the food she puts in her mouth, it means the clothes on her back, the house in which she lives, and the money which she has in her pocket, all of which vary according to the means of the man who leaves a wife behind him. I think that must be so. Maintenance cannot mean only a mere subsistence.

Although the above case involves a testator and provision for his widow, the concept of what constitutes maintenance for a wife, as in this case, I believe, should be the same. Thus to me, what amount of maintenance the husband should pay to the wife must depend on the means and needs of the parties, taking into account the standard of living of the parties which was enjoyed by them during the marriage.

It is the contention of the husband that the wife is not entitled to any maintenance. This is because, as argued by learned counsel for the husband, that the wife is a professionally qualified architect, qualified and licenced to practice in the United Kingdom. Hence, she is capable of earning a good living in the United Kingdom. In addition, according to learned counsel that the wife is much younger than the husband and has several gainful years ahead of her, whereas the husband is due to retire in three years time. Moreover, as pointed by learned counsel that the couple has no children to the marriage and as such the wife is free to lead her own independent life as an architect without any responsibility of any children. To support his submission that no maintenance should be ordered, learned counsel quoted the case of *V Sandrasagaran a/l Veerapan Raman v. Acttarssar Velentine Souvine Marie* [1999] Mallal's Digest 557.

The wife, on the other hand is seeking maintenance for RM10,000 a month, including arrears which ought to have been paid by the husband. In response to the issues raised by the husband, learned counsel for the wife submitted as follows:

(i) *The wife s architectural qualifications*

She is unable to work as an architect in Malaysia. This is because her qualifications are with the Royal Institute of British Architects, and in order to be able to practice as an architect in Malaysia, she must first be registered with the Lembaga Akitek Malaysia (LAM). To qualify for registration, she would first have to pass the Pertubuhan Akitek Malaysia (PAM) professional examinations and undergo a minimum of two year working or training with a local architect firm. However, a prerequisite for sitting the PAM examination is that she must either have a Malaysian citizenship or at least a permanent residence in this country. She posseses neither.

(ii) *Returning to United Kingdom*

She left the United Kingdom in 1993 some 14 years ago in order to live in Malaysia with the husband. Even before that she had ceased practicing as an architect when the husband in 1991 accepted a posting in Inverness, Scotland, where there were no job prospect. Thus, when she moved to Malaysia, she effectively gave up her right to practice architecture in the United Kingdom.

Moreover, in order for her to return to reside in the United Kingdom, after a lapse of 10 years, she would have to apply for a returning resident visa, to which she is not automatically entitled.

I am in agreement with learned counsel for the wife with regard to the issue of maintenance. The husband's contention that no maintenance should be paid is unsustainable. The *Sandrasagaran*'s case cited by learned counsel for the husband is not in all fours with the present case. In that case, the parties were legally married in 1991. However, the marriage was never solemnized according to Hindu custom. This resulted in the parties living apart since the marriage. The marriage was never consumated and there were no children of the marriage. The petition for divorce was served on the wife in 1993. But only in 1998, they filed a claim for maintenance, almost seven years after the marriage and that too after he had commenced divorce proceedings.

In our present case, the facts are totally different. The parties had been married for the past 17 years. She had followed the husband to Malaysia and Malaysia has been her home for the past 11 years, where she thought she would live the rest of her life, in matrimony with the husband. Thus, it is unconscionable for the husband now, to insist for the wife, to go back to the United Kingdom and to practice her architecture in the United Kingdom. She had sacrifice her career to follow the husband to his various postings in the United Kingdom and ultimately in Malaysia in order to set up a home. Today the husband has very successfully advance his status in life and is now a successful ENT surgeon. Surely the husband cannot just abandoned the wife by refusing to provide maintenance for her. This court will not be doing justice if no maintenance is ordered against the husband.

What is needed to be decided now is the amount of maintenance to be awarded to the wife. It is an established principle that in deciding what amount of maintenance the husband should pay the wife, the court must take into consideration the means and needs of the parties. In assessing the means and needs of the parties the court has always had regard to the duration of the marriage, whether there were any children of the marriage, the age of the parties, whether the husband had financially supported the wife during the duration of their marriage, the parties earning capabilities and whether the divorce would have affected the husband's position financially.

It is evidence in this case that prior to the breakdown of the marriage, when parties were still cohabiting, the following was made to the wife:

(a) Residence at Pantai Panorama Condominium, paid for by the husband.

(b) Use of a Mercedes Benz 190E bearing registration No. BDV 411.

(c) Access to at least two joint bank accounts.

(d) Payment of all household bills and outgoings by the husband.

(e) Payment of all monthly mortgage/bank loan installments by the husband.

(f) Holidays to the United States of America, United Kingdom, Australia, New Zealand, Hong Kong, Bangkok, Indonesia.

(g) Membership of the Royal Selangor Yatch Club and the Royal Selangor Club.

The wife had set out her current expenses as in encl. 24 at para. 6 amounting to RM5,040 per month. The expenses are after the separation, that is, when the husband ceased to maintain her and does not include various items which were made available to her during the marriage by the husband such as membership of clubs, holidays and use of vehicle. It also does not include the cost of her accommodation as the husband is still paying the monthly installments on the bank loan taken for the purchase of the Pantai Panorama Condominium, where the wife is residing.

The husband filed his affidavit of means on 7 February 2002. The husband stated that his gross monthly income is RM10,000 as an employee of Swiss Atlantic Sdn Bhd. However, this is being disputed by the wife. It is the submission of learned counsel for the wife that the husband had not been truthful about his income and had failed to make full and frank disclosure. This court has been urged to draw adverse inferences with regard to the husband's income as the result of his failure to make full and frank disclosure as provided for under s. 114(g) of the Evidence Act 1950. Learned counsel referred to the case of *Leow Kooi Wah v. Philip Ng Kok Seng (Fifi Leong Kam Chon as co-respondent)* [1997] 2 AMR 2108; [1997] 3 MLJ 133, where justice Mahadev Shankar speaking for the High Court held:

> Whatever the disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath, the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings.

In the present case, the husband's attitude mirrors the husband described by justice Mahadev Shankar in the *Leow Kooi Wah*'s case. The husband has dragged his feet in every aspect in relation to discovery in this case. He had attempted to avoid disclosing information in relation to his means. As such, the husband's declaration which he finally did, that his gross income as RM10,000 is questionable. This is especially so when the documents clearly shows otherwise. The accounts of Swiss Atlantic Sdn Bhd show the following payments were made:

Accounts for Year Ending	Exhibit	Turnover	Directors' Remuneration
31.7.1997	R 80 Bundle 1 Pages 204-208	RM39 1,269	other emoluments RM70.000 Fees RM210,000
31.7.1998	R81 Bundle 1 Pages 219-233	RM650.074	other emoluments RM294,000 Fees RM70,000
31.7.1999	R 82 Bundle 1 Pages 234-248	RM646.774	other emoluments RM154,400 Fees RM45,000
31.7.2000	R 83 Bundle 1 Pages 249-265	RM905,753	other emoluments RM158,000 Fees RM285,000 (dividends of RM110,192 were also paid that year)
31.7.2001	R 84 Bundle J Pages 1-17	RM1,171,701	other emoluments RM143,400 Fees RM300,000

When reading the above table, the following must be borne in mind:

(i) By the husband's own admission, Swiss Atlantic Sdn Bhd was set up to receive the fees charged by the husband in his medical practice. The income generated by that company is the husband's income.

(ii) The husband is a 90% shareholder in Swiss Atlantic Sdn Bhd.

(iii) The husband's contention is that his brother also worked in the husband's practice but he was paid for his services as a consultant.

(iv) The husband is effectively in control of all aspects of Swiss Atlantic Sdn Bhd.

Thus, I am unable the accept the husband's declaration that his income is RM10,000 a month. To me, the means of the husband in this case is more than RM10,000 a month. But it is unfortunate that the amount could not be ascertained because the husband did not make a full and frank disclosure of his income. Thus, the husband should not be complaining when this court is

drawing inferences against him. However, this does not mean that the wife's request of RM10,000 a month as maintenance should be granted fully. Considering the facts of this case and applying it to the principles that I have mentioned earlier, I am of the view that an amount of RM6,000 a month as maintenance for the wife is a reasonable amount, to commensurate with the lifestyle and standing of the couple during the marriage.

(iii) Arrears Of Maintenance

Section 86 of the Law Reform Act provides for the recovery of arrears of maintenance for the wife. It is not disputed by the husband that he had not been giving the wife any maintenance since July 1998, that is when the husband left the matrimonial home. As such, I am making an order that the husband to pay arrears of maintenance to the wife a sum of RM6,000 a month from July 1998.

(iv) Division Of Matrimonial Assets

With regard to matrimonial assets, it is the contention of the husband that the wife did not contribute towards the purchase of any property and thus should get nothing from the properties that he owned. The wife on the other hand contends that she had directly or indirectly contributed towards the acquisition of the various matrimonial assets and that she should be entitled to one half of the assets.

It is the submission of learned counsel for the wife that the wife's entitlement to half of the matrimonial assets is derived under the provision of the law, namely s. 76(1) and (2) of the Law Reforms Act by:

(i) Her direct contributions in money, properties or work towards the acquiring of the assets;

(ii) The contracting of debts by her for their joint benefit; and

(iii) Her indirect contributions as homemaker towards caring for the husband and homes both in the United Kingdom and in Malaysia.

Learned counsel cited the Court of Appeal case of *Ching Seng Woah @ Cheng Song Huat (p) v. Lim Shook Lin* [1997] 1 AMR 214; [1997] 1 MLJ 109, wherein Mahadev Shankar J, had referred to the Singapore case of *Shirley Koo v. Kenneth Mok Kong Chuan* [1989] 2 MLJ 264, as the approach the court should be guided in considering the issue of property division. In both cases the court held that the wife's contribution (financial or otherwise) towards the household, that is, purchase of furniture, kitchen appliances, groceries etc. is a contribution towards the acquiring of that property for the purposes of s 76 of the Act. I am considering the issue of property division on the same approach.

The properties being contested in this case are:

A In the United Kingdom

(i) No 111 Queens Court, Queensway, registered in the name of the husband.

(ii) No 53, Ringmore Rise, Forest Hill registered in the name of the husband.

(iii) No 40, Derby Hill, Forest Hill, registered in the name of the husband's brother as nominee for the husband and wife.

B In Malaysia

(i) Registered in joint names of the husband and wife:

(a) An apartment at No A-15-05 Sunnyville, Penang.

(b) An apartment at 22-03A Midland Park, Penang.

(ii) Registered in the name of the husband:

(a) Two lots of land at Taman Lumba Kuda, measuring in total 8,605 square feet held under title HS(M) 276/1991, PT 1252 and HS(M) 277/1991, PT 1263 both at Mukim Alor Merah, Kedah.

(b) 5-11-7 Pantai Panorama Condominium, Off Jalan Kerinchi, 59200 Kuala Lumpur.

(c) Land at Country Heights, Mines Resort.

(iii) Registered in the name of Swiss Atlantic Sdn Bhd:

(a) Semi detached house in Taman Golf, Alor Setar.

(b) Clinic premises at Gleneagles Intan Medical Centre, Kuala Lumpur.

(iv) Registered in the name of Eng Hoe Leong Sdn Bhd:

(a) Two shoplots at Sunny Point, Penang.

Properties In United Kingdom

All the properties in the United Kingdom were sold during the subsistence of the marriage. No 111, Queen's Court, Queensway was sold for GBP 146,000 in July, 1987. No 53, Ringmore Rise, Forest Hill was sold in 1988 for GBP179,000 while No 40, Derby Hill was sold in 1992, shortly before the

parties returned to live in Malaysia. Since the properties had been sold by the husband, the issue on the division of the said properties between the husband and the wife, is no longer an issue.

Properties In Malaysia

(i) A-15-05 Sunny Ville, Penang
This property was purchased in the joint names of the husband and the wife. It was purchased in 1993 for RM202,000. According to the husband the deposit and purchase price of the property was paid for by using the proceed of sale of the property at 40, Derby Hill, United Kingdom. Since the property is under joined names of the husband and wife and there is an overdraft taken against the property, the wife should be entitled to one-half of the net value of the said property.

(ii) Land at Taman Lumba Kuda
This property is registered in the sole name of the husband. It is the wife's contention that this property was bought by the parties with the intention of building a house for the parties to reside in upon their return to Malaysia. To support her claims, she produced a letter (exh. R48) from the husband to his brother where in the husband had stated:

> Thank you for Taman Golf home plan. They are receiving attention from Linda. We have opted for Lot No 2 as previously agreed by Eng Hai. (husband's brother in law).

The husband admitted that the word "we" in exh. R48 referred to himself and the wife. However, his evidence in regard to this property is punctuated with contradictions. In his reply to answer to the cross-petition (encl. 7) he had stated at para. 12.4 that these plots of lands were purchased by him and his sister jointly with their joint funds. However, in his examination in chief, the husband states that "the two plots of land in Alor Setar, Kedah were bought by me on behalf of my sister Koay Cheng Sim". Still further, the husband stated that the land was "meant for my parents". As to why the land was registered under his name, his answer during his re-examination was that because the owner of the land would only sell the land to him and nobody else.

No doubt the husband called his sister, Koay Cheng Sim (PW3) as a witness to corroborate his story. But her evidence failed to explain as to why the land was registered under the name of her brother.

To me, taking the evidence as a whole, it is my finding that the land at Taman Lumba Kuda, was purchased by the husband not on behalf of his sister, nor meant for the husband's parents, but was purchased with the intention of building a house for the parties to reside upon their return to Malaysia. Thus, the wife is entitled to one-half of the value of the two lots of land at Taman Lumba Kuda.

(iii) Bangsar Heights Condominium, Lorong Kalai Bangsar, Kuala Lumpur
This was the first matrimonial house in which the parties lived in Malaysia. It was purchased in 1993 and the parties moved into the condominium in 1994. However, this property was sold for RM250,000 in 1996, and as such is no longer an issue.

(iv) 5-11-7 Pantai Panorama Condominium Off Jalan Kerinci, 59200, Kuala Lumpur
Pantai Panorama was the second matrimonial home of the parties in Malaysia. It was purchased in 1994 in the husband's name and the parties moved in early 1997. This property was purchased for RM269,100. The wife's evidence is that the deposit of RM75,500 was paid from the monies brought back from United Kingdom together with the balance funds obtained from refinancing the Mercedes 190E registration No BDV 411. The rest of the purchase was financed by a loan from Pacific Bank.

The husband admitted that the property was financed by the monies brought back from United Kingdom amounting to RM75,000 cash and a loan from Pacific Bank. But he contended that he bought this property for personal investment. The wife in his evidence, testifies that, it was the intention of the parties that the said property would be their matrimonial home. The letter of offer to purchase from the developer dated 15 April 1993 was adduced as evidence, where it could be seen that the letter was addressed to both the husband and wife and both of them signed the letter in acceptance of the offer.

It is also the evidence of the wife that she supervised the renovation works including the addition of air-condition points, electrical rewiring, lighting points and variation on flooring in the living room before the parties moved in. According to the wife, when they moved in, she had to monitor rectification work which, amongst others, included replacing the parquet in the master and second bedroom. This part of evidence of the wife was not challenged by the husband. As such I have no hesitation to conclude that the said property is the matrimonial home and the wife is entitled to one-half of the net value of the said property.

(v) Condominium at 22-03A, Midland Park, Penang
The property was purchased in joint names in 1995 for RM250,000 by a joint housing loan for RM200,000 in the names of the parties. However the property was sold for the amount RM380,000 in 1998 by the husband.

(vi) Land at Country Heights, Mines Resort
It is admitted by the husband that he bought a piece of land at the Mines Resort costing RM600,000 financed by a 100% loan which he has partly repaid. I am also making an order that the wife be entitled to one-half of the net value of the property of the said land.

I am making the above mentioned orders because the properties were bought during the marriage. Moreover, as admitted by the husband that most of the properties in Malaysia were paid using the monies repatriated from the United Kingdom. The evidence also revealed that some of the properties bought were sold and the proceeds were used to purchase other properties.

I am unable to accept the husband's contention that the monies from the sale of the properties in United Kingdom belonged to him only. To me, the wife has in her evidence proved direct contribution to the purchase of the properties in United Kingdom. No 111, Queen's Court, Queensway, although purchase at the time with a loan in the name of the husband and his second wife, by the husband's own admission that he had already lived separately and he had sought the assistance of his ex-wife to use her name to assist in the application for the bank loan. At that time, the husband was actively courting the wife and after marriage they lived at the said property. During the time they lived there, the husband was working at St Helier's Hospital earning GBP 1,400 a month. The wife was working at Moxley, Jenner & Partners as an architect. According to the evidence, the financial arrangements between them then were that the wife paid towards the upkeep of the household as well as buying groceries while the husband paid for the mortgage installments for the said house. Thus, it cannot be said that the wife did not contribute financially on the said property.

No 53, Ringmore Rise, Forest Hill was purchased for the price of GBP135,000 in the name of the husband, but with a joint loan in both their names. Surely the husband cannot just dismiss the wife's contribution to the said property.

No 40, Derby Hill was purchased in the name of the husband's brother, (Hong Cheng Leong) as their nominee because at the time of the purchase the husband did not have a permanent appointment, and it was therefore not possible for him to get a loan under his name. Furthermore, the names of both parties were still tied up with the joint loan taken out for the purchase

of 53, Ringmore Rise. The husband denied that he purchased the property at 40, Derby Hill, contending the property was purchased by his brother. However, his contention is contrary to the following evidence:

(a) A sum of GBP400 was transferred each month from the husband's and wife's joint account to Koay Cheng Leng. But according to the husband GBP400 was for renting this property from his brother. But the alleged renting was never pleaded by the husband in his reply and answer to the cross-petition. Thus, his allegation that the monthly sum of GBP400 remitted to his brother's account towards rental is clearly an afterthought.

(b) They continued to make the GBP400 monthly payments to the husband's brother even when they had moved to Cardiff Wales, for 13 months.

(c) The property was sold in 1992, shortly before the parties returned to live in Malaysia. In cross-examination the husband admitted that the property was sold for a net profit of GBP28.000. The sum was transferred by his brother to his bank account.

(d) In a letter from the husband to another brother, the husband clearly states that the GBP28,000 were the proceed of sale from the said house when he stated "Leong has recently made several remittance to his Citybank account around GBP30.000. These are the balance of the proceeds from the sale of my house in London".

(e) Shortly before the couple returned to live in Malaysia, the husband had drawn a list of the joint assets of the couple (exh. R29) where the property at 40, Derby Hill was listed as an asset of the couple.

Thus, taking all the evidence as stated above, there can be only one conclusion that the property at 40 Derby Hill was purchased by the husband and the wife using the husband's brother's name as their nominees. The net proceed of the sale of GBP28,000 was remitted back to Malaysia and used to pay for the purchase of the properties in Malaysia.

Eng Hoe Leong Sdn Bhd

The wife is seeking 40% of the value of two properties registered under Eng Hoe Leong Sdn Bhd be divided equally between the husband and herself. The shareholders of the company are as follows:

(i) husband – 30%

(ii) wife – 10%

(iii) Koay Chee Leong – 30%

(iv) Koay Cheng Hoe – 30%

The company is a property holding company which owns two shoplots:

(1) G-01, Sunny Shopping Centre, Penang.

(2) G-14, Sunny Shopping Centre, Penang.

Unit G-01 was purchased for RM433,500 while Unit G-14 was purchased RM601,400. Thus the total purchase price for both units was therefore, RM1,034,900.

It is admitted by the husband that the purchases of the two units were financed by a term loan of RM550,000 and overdraft of RM250,000, leaving a balance of RM234,900. Further, the husband admitted that the balance of RM234,500 was financed by loan given by the husband and his brother Koay Cheng Leng and Koay Cheng Eng. The husband himself gave a loan of RM51,000 which was paid using monies brought back from the United Kingdom. It is also admitted by the husband that, he channelled the proceeds of sale of the property that is Midland Park, registered in the joint names of the husband and wife amounting to RM85,000 into the company. Presently both properties are rented out.

Thus, on the facts and considering the combine shareholding in the company between the husband and wife is 40% I am of the view, the wife should be given 20% of the net value of the shoplots at G-01 and G-14, Sunny Point, Penang.

Swiss Atlantic Sdn Bhd

The wife has given evidence that she assisted the husband in the setting up and administration of the clinic at Tung Shin Hospital by:

(a) attending to the bookkeeping;

(b) monitoring the expenses and program of the clinic;

(c) counter-checking the portion of professional fees due to Swiss Atlantic Sdn Bhd from Tung Shin Hospital;

(d) preparing letters and reports dictated by the husband;

(e) fixing appointments for patients;

(f) running errands for clinic purpose to the post office, banks etc.

It is the contention of the wife that her assistance at the clinic at Tung Shin Hospital enabled the husband to devote his energy to the running of the clinic. This inturn helped the husband to establish his name as one of the foremost in the area of ENT. According to her it was this success of his clinic at the Tung Shin Hospital and financial resources therefore that enable the husband to move and set-up his practice at the Gleneagles Intan Medical Centre. Thus, it is the contention of the wife that she had contributed towards the setting up of the clinic at Tung Shin Hospital and its development or evolution subsequently into the clinic at Gleneagles Intan Medical Centre should be valued. The valuation, according to the wife, should include the company Swiss Atlantic Sdn Bhd, its equipment, goodwill and assets (including revenue generated by the clinic) and she be given one half of its value. The Court of Appeal case of *Sivanes a/l Rajaratnam v. Usha Rani alp Subramaniam* [2002] 3 AMR 2729; [2002] 3 MLJ 273 was cited as the authority. In *Sivanes* case, the husband was also a doctor who ran a clinic, and the Court of Appeal accepted that the wife was entitled to a share of the clinic based on the High Court's findings that the wife had contributed to the setting up of the clinic by, amongst others:

(i) standing as guarantor for banking facilities.

(ii) selling the family car to tide over the difficult period; and

(iii) utilising joint savings in the opening of the clinic.

In our present case, the facts are quite different. The alleged contribution by the wife was strongly denied by the husband. In fact, the husband produced a witness, Saraswathy a/p Sinnathi (PW2) to give evidence. PW2 is a nurse, serving the husband at Tung Shin Hospital. In her evidence, she said that the wife only came to the clinic at Tung Shin Hospital twice and it was to get something from the husband. Thus, according to her the wife did not help in the setting up or the operation of the clinic.

Taking the evidence of the wife as well as the evidence of the husband and PW2, I am unable to conclude that the wife had contributed towards the setting up of the clinic, to entitle her a share of the clinic based on the principle of *Sivanes* case.

Motor Vehicles

It was the wife's evidence that two cars were sold in the United Kingdom to purchase the Mercedes Benz which was subsequently imported into Malaysia and given registration No BDV 411. The two cars that were sold were a BMW driven by the husband and a Renault driven by the wife.

The husband admitted that the Mercedes Benz was also intended for the use of the wife. The Mercedes Benz was later brought back to Malaysia and given the registration No BDV 411. After the separation, the husftand took sole possession of the said Mercedes Benz BDV 411. The husband later leased the Mercedes Benz BDV 411 to Swiss Atlantic Sdn Bhd for RM120,000. Swiss Atlantic later purchased another Mercedes Benz, this time C200 registration No SUKOM 1029. In 2001 Swiss Atlantic Sdn Bhd sold the Mercedes BDV 411 and purchased a Honda City 1.5 in the name of the husband.

It is the contention of the wife that the car should be put into the pool of joint assets for the following reasons:

(a) The Mercedes Benz, bought in the UK and brought to Malaysia, came from joint fund.

(b) The husband had intended the Mercedes Benz registration No BDV 411 for the use of the wife.

(c) The Mercedes Benz registration No BDV 411 was leased to Swiss Atlantic Sdn Bhd and the husband made a sum of RM120,000 in the process.

I agree with the contention of the wife. Accordingly, the vehicles Mercedes Benz C200 registration No SUKOM 1029 and Honda City registration No BFG 118 should be valued and the wife be given one half of its value.

Employees' Provident Fund

It is the contention of the wife that the husband's Employees Provident Fund (EPF) monies should be made available for division as EPF monies are matrimonial assets liable for division. The case of *Ching Seng Woah @ Cheng Song Huat (p) v. Lim Shook Lin & Anor* [1997] 1 AMR 214; [1997] 1 MLJ 109, was cited as the authority.

I am of the same view that EPF contributions are matrimonial assets when acquired during the marriage. In the present case the evidence clearly pointed to the fact that the EPF contributions of the husband were made during the marriage. From the husband's own documents in bundle J, it can be seen that the husband's EPF opening balance was zero in 1993, that is, when the parties

returned to Malaysia. In the first three years the husband completed his government service at University Hospital and thereafter started the private practice at Tung Shin Hospital, his EPF amount has grown as follows:

Year	Exhibit	Amount
1993	Bundle Jpg 285	RM 4,387.00
1994	Bundle Jpg 286	RM 21,614.41
1995	Bundle Jpg 287	RM 37,808.41
1996	Bundle Jpg 288	RM 53,017.47
1997	Bundle Jpg 289	RM 83,016.45
1998	Bundle Jpg 289	RM 105,237.17
1999	Bundle Jpg 290	RM 114,656.40
2000	Bundle Jpg 291	RM 188,205.78

Thus, it can be seen that while the husband had accumulated as in the year 2000 the sum of RM 188,205.78 in his EPF account, the wife has no EPF monies. From her perspective, she had entered into a marriage with the intention of growing old with the husband and on his retirement they would both have been able to enjoy the benefit from the monies set aside in EPF contributions. The husband's EPF would have been used for the benefit of them both. Now with the breakdown of the marriage, the husband should not be allowed to solely benefit from the EPF. Accordingly, I am making an order that the wife be entitled to half of the amount standing to the account of the husband's EPF account as at the time of this divorce and such monies should be paid out to the wife when the same is made payable to the husband.

Conclusion

Thus, the order of this court is as follows:

(1) The husband to pay the wife RM6,000 a month as maintenance.

(2) The husband to pay the wife arrears of maintenance of RM6,000 a month from July 1998.

(3) The husband to pay the wife:

(a) One half (1/2) of the nett value of the property at A-15-105 Sunnyville Penang.

(b) One half (1/2) of the value of the two lots of land held under HS(M) 276/1991, PT 1252 and HS(M) 277/1991, PT 1263 both at Mukim Alor Merah, Negeri Kedah Darul Aman.

(c) One half (°) of the nett value of the property at 5-11-7, Pantai Panorama Condominium.

(d) 20% of the nett value of shop lots at G-01 and G-14 of Sunny Point Penang.

(e) One half (°) of the nett value of the land purchased in the husband's name at Country Heights, Mines Resort.

(4) The motor vehicles, Mercedes Benz C200, registration No SUKOM 1029 and Honda City, registration No BFG 118 be valued and the wife be given one-half (°) of their value.

(5) Half of the monies standing to the husband's EPF account as at the date of divorce, be paid to the wife when it is paid to the husband when he attains the age of withdrawal.

(6) The husband to bear the costs of the petition and the cross-petition.